UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RAED JARRAR,

Plaintiff,

v.

HARRIS, Transportation Security Administration Inspector # I 2425, in his individual capacity; JETBLUE AIRWAYS, CORP.; FRANCO TROTTA, in his individual capacity; and JOHN and JANE DOES 1-9,

Defendants.

CASE NO. 07-3299 (CBA) (JO)

**PLAINTIFF AND THE ACLU'S REPLY IN SUPPORT OF MOTION TO QUASH SUBPOENA SERVED UPON THE ACLU**

Plaintiff and the ACLU file this reply brief in support of their motion to quash, and seek leave to do so, if necessary, in response to JetBlue's assertion in its most recent brief that despite the express statements in its prior two briefs, it is now seeking a broader set of documents than its previous briefs indicated.[1]

JetBlue's brief is filled with numerous characterizations and accusations, and much rhetoric. It does not, however, contain almost any substantive argument. JetBlue completely fails to address why the remaining non-disclosed, confidential video outtakes and emails prepared by Plaintiff's attorneys, which contain the attorneys' mental impressions and thoughts, are not privileged as work product. Remarkably – and tellingly – JetBlue fails to even mention the controlling Second Circuit case, *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998), which makes clear that the materials JetBlue is seeking are protected by the work-product privilege. As Plaintiff and the ACLU explained in their earlier brief, these documents are privileged because they were prepared "because of" this litigation – had this lawsuit not been filed, the ACLU would not have created the video footage, and the emails would never have been drafted. *See* Plaintiff and the ACLU's Opposition and Motion to Quash ("Opp. and Motion"), at 6-12 (citing, *inter alia, Adlman*, 134 F.3d at 1202, 1204; *Allied Irish Banks v. Bank of America, N.A.*, 240 F.R.D. 96, 106 (S.D.N.Y. 2007)).

Nor does JetBlue provide any legitimate explanation for why it needs to obtain Plaintiff's attorneys' statements and emails. That is because there is no possible need for this information other than to obtain Plaintiff's attorneys' thoughts and impressions about the case. These documents contain no admissible evidence. Although JetBlue again conclusorily asserts that the attorney statements are relevant because they must have been based on information obtained from Plaintiff, JetBlue fails to even attempt to explain how that is different from any other attorney-generated document, such as, for example, JetBlue's Answer in this case. *See* Opp. and Motion, at 12-17.

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[1] Although ostensibly functioning as both a Reply and Opposition, JetBlue's newest brief is 18 pages long, in clear violation of the Court's rules regarding reply briefs. JetBlue's brief should either be rejected pursuant to the Court's rules regarding reply briefs or treated as an opposition to Plaintiff and the ACLU's motion to quash the subpoena to the ACLU, entitling Plaintiff and the ACLU to file this reply. In the alternative, Plaintiff should be granted leave to file this brief to respond to JetBlue's new attempt to broaden the scope of the documents its motion seeks.

Rather than address the merits, JetBlue attempts to paint a dramatic picture of an organized effort to hide documents from JetBlue. That characterization is unfounded and is at odds with the facts. Plaintiff has provided JetBlue with every single document that Plaintiff has containing any statements that he has made to any member of the media about the events underlying this lawsuit.[2] In addition, although the draft, confidential video outtakes of Mr. Jarrar that were created by the ACLU in connection with this lawsuit are covered by the work-product privilege because they were created "because of" this lawsuit, the ACLU nevertheless timely provided those outtakes to JetBlue in response to the subpoena in an attempt to resolve this discovery matter and to avoid an unnecessary discovery fight. The only other documents that have not been produced are ACLU documents containing statements by Mr. Jarrar's attorneys and their agents in connection with the lawsuit. Specifically, as Plaintiff and the ACLU made clear in their prior brief, those documents consist of: (1) the unpublished, confidential video outtakes of Plaintiff's attorneys; (2) emails between the attorneys and their staff regarding the lawsuit and the video; (3) emails between the attorneys and their staff and Mr. Jarrar regarding the lawsuit and the video; and (4) unpublished, confidential video outtakes of background scene shots. These documents are all protected by the work-product privilege, *see Adlman*, 134 F.3d at 1202; *In re Copper Market Antitrust Litig.*, 200 F.R.D. 213, 221 (S.D.N.Y. 2001), and JetBlue does not seriously contend otherwise.[3]

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[2] JetBlue attached a number of documents to its accompanying declaration containing statements about the incident by Plaintiff. Burns Decl., ¶ 3, Exhs. 2-7. JetBlue describes these documents as "publicly available" documents, implying that JetBlue obtained these on its own and that Plaintiff failed to produce them. *Id.* What JetBlue fails to mention is that Plaintiff produced all of these documents to JetBlue. JetBlue also conclusorily asserts in its declaration that these attachments reflect inconsistent statements by Plaintiff. *Id.* No examples of any such inconsistencies are provided, and Plaintiff disagrees with this characterization. Placing arguments of this nature in a declaration is not proper, and contradicts this Court's clear rule prohibiting such declarations. Pursuant to its rule, the Court should strike the declaration from the record.

JetBlue's assertion that Plaintiff previously refused to provide any information about the documents in his possession is disingenuous. Despite Plaintiff's repeated requests for information as to why JetBlue believed these documents to be non-privileged, JetBlue refused to provide any answer for months. *See* Opp. and Motion, at 5; Fine Decl. (filed on August 5, 2008), ¶¶ 14-20. Nor, despite its representations in its new brief, did JetBlue ever ask Plaintiff to tell it what the privileged documents were. *Id.* Indeed, this entire issue appeared extinct, as JetBlue failed to even respond to Plaintiff's May 6 statement on the subject, waiting until the eve of depositions to re-open this issue and first inform Plaintiff of its rationale. Fine Decl., ¶ 20.

JetBlue's claim that it has been prevented from proceeding appropriately because of the lack of a privilege log is frivolous. The reason no privilege log regarding these documents has been provided is that all of these documents reflect communications between Plaintiff's attorneys and either their agents or Plaintiff himself regarding the lawsuit and the video. Communications between attorneys and their staff or with the client do not need to be placed on a privilege log. *See, e.g., United States v. Int'l*

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[3] JetBlue appears to concede as much, stating that: "To be clear, JetBlue is not seeking to intrude upon legal theories or litigation strategies of Plaintiff's counsel." Brief, 15. If that is truly the case, Plaintiff and the ACLU are perplexed as to why JetBlue has insisted on continuing with its motion now that the ACLU has provided the confidential outtakes of Mr. Jarrar and all that remains are attorney statements and emails.

*Longshoremen's Assoc.*, No. 05 CV 3212, 2006 WL 2014093, *2 (E.D.N.Y. July 18, 2006) (itemization of attorney notes is not required to be included on a privilege log in a law firm-like setting); *State of New York v. The Shinnecock Indian Nation,* No. 03 CV 3243 (E.D.N.Y. May 31, 2006) ("The court is unaware of any rule which requires itemization of what is essentially counsel's correspondence file with his/her client.").[4] Despite their repeated assertions, JetBlue (and the government defendants) knows this full well: JetBlue has not provided any privilege log detailing either the internal communications of its litigation attorneys or any communications between its litigation attorneys and its various client representatives. Nor have the government defendants done so. JetBlue's argument regarding the lack of a privilege log is a red-herring and should summarily be rejected.

JetBlue also attempts to distract the Court from the legal merits of its motion by claiming – again without basis – that Plaintiff and the ACLU somehow duped them into agreeing to an extension of time to respond to the motion. The return date on the subpoena that JetBlue served on the ACLU on July 16, 2008 – an hour-and-a-half before filing its motion – was for August 5, 2008. Given that the issues raised by the subpoena and by JetBlue's just-filed motion implicated virtually identical privilege issues belonging to both Plaintiff and the ACLU, Plaintiff and the ACLU requested that they be given until August 5 – the subpoena return date – to provide their response. Neither Plaintiff nor the ACLU ever informed JetBlue that the sole reason for the extension was to permit the ACLU to brief the journalist's privilege issue. *See* July 17, 2008 Letter, at 1 (Docket No. 35) ("Because of the complexity of the issues raised by this motion, *including* issues of privilege related to the ACLU's role as counsel in this case *and* its

[4] A copy of this case is attached to the Fine Supplemental Decl. as Exh. 1.

independent status as a First Amendment entity that regularly communicates with the general public on civil liberties matters, *and* because a subpoena seeking the identical information has just been served on the ACLU itself as a non-party to this litigation . . . .") (emphasis added).[5] That the ACLU ultimately chose not to require the Court to address the complicated constitutional issue of whether the First Amendment prohibits JetBlue's requests to the ACLU does not mean that the ACLU either agrees with JetBlue's arguments or that Plaintiff and the ACLU somehow tried to trick JetBlue. Indeed, it is well-established that courts should avoid resolving constitutional issues where possible. *See, e.g., Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).[6]

JetBlue's attempt to expand its motion to require the ACLU to produce attorney emails should be rejected. Although JetBlue now claims that it has always been seeking these documents in addition to the video outtakes, and that Plaintiff and the ACLU are trying to "unilaterally limit" JetBlue's motion, the express language of JetBlue's prior briefs could not be clearer. *See* JetBlue 7/16/08 Letter Br. at 1 (requesting "all video and internet statements of Plaintiff and/or the ACLU, and all shooting scripts, interview scripts, outtakes, or unused footage created in connection therewith"); JetBlue 7/25/08 Letter Br. at 1 (seeking production of "'public relations materials': video and internet

[5] JetBlue's counsel's representation in his declaration to the contrary, *see* Burns Decl., ¶ 2, is surprising given what actually occurred. Indeed, before representing to the Court that JetBlue consented to the extension in its July 17 letter, Plaintiff's counsel telephoned JetBlue's lead counsel, Christopher Kelly, and read to him the language of the letter quoted above that would be submitted to the Court, clearly indicating that there were numerous reasons for the extension. Supplemental Decl. of Aden Fine, attached hereto, ¶ 2.

[6] That Plaintiff and the ACLU similarly did not extensively dwell on JetBlue's claim that Plaintiff has control over the ACLU's internal documents is also of no import. JetBlue has now served a subpoena on the ACLU, who does have control over these documents. In any event, as explained before, the attorney emails and video outtakes were never given to Plaintiff, never seen by Plaintiff, and never intended to be given to Plaintiff or to anyone outside the ACLU. They were, and remain, exclusively the ACLU's documents, and Plaintiff has no legal entitlement to them. Curry Decl. (filed August 5, 2008) ¶¶ 8, 10; Fine Decl. ¶¶ 10, 12.

statements of Plaintiff and/or the ACLU regarding the alleged incident at the core of Plaintiff's allegations in this case, and all shooting scripts, interview scripts, outtakes, or unused footage created in connection therewith."). JetBlue does not even mention these prior statements. JetBlue should not be permitted to change its motion in its third brief on the subject.

JetBlue's new request for attorney emails should also be rejected because, as with the video outtakes, the attorney emails – which were written purely because of this lawsuit – are protected by the work-product privilege. *Adlman*, 134 F.3d at 1202; *In re Copper Market Antitrust Litig.*, 200 F.R.D. at 221.[7] As Plaintiff and the ACLU's opening brief noted, *see* Opp. and Motion, at 14 n.6, these attorney emails are also protected from disclosure by the attorney-client privilege. These emails contain the confidential legal advice, insights and thoughts of Plaintiff's attorneys regarding the case, including whether certain items would be helpful or harmful to the lawsuit. Several of these emails include direct communications with Plaintiff about the case and issues involved in the case. The attorney-client privilege clearly covers such documents. *See Upjohn v. United States*, 449 U.S. 383, 396-97 (1981); *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321, 331-32 (S.D.N.Y. 2003); *In re Copper Market Antitrust Litig.*, 200 F.R.D. at 217.

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[7] JetBlue's reliance on *Calvin Klein Trademark Trust* v. *Wachner*, 198 F.R.D. 53 (S.D.N.Y. 2000), is misplaced. In *Calvin Klein*, the court simply held that public relations advice given for non-litigation-related, business purposes was not work product. As detailed in Plaintiff and the ACLU's opening brief, the materials at issue here were prepared because of the litigation, not purely for business or other non-litigation purposes. Opp. and Motion, at 2-4. Notably, the court in *Calvin Klein* refused to order production of "counsel-drafted or counsel-selected materials given by [Calvin Klein's counsel] to [the public relations firm]" because "[i]t does not follow . . . that an otherwise valid assertion of work-product protection is waived with respect to an attorney's own work product simply because the attorney provides the work product to a public relations consultant whom he has hired and who maintains the attorney's work product in confidence." *Calvin Klein*, 198 F.R.D. at 55-56.

## CONCLUSION

The only information that JetBlue is now seeking are documents containing Plaintiff's attorneys' mental thoughts and impressions. There is no legitimate need for JetBlue to obtain this material. Even if there were, the documents are protected by both the work-product privilege and the attorney-client privilege. For the foregoing reasons and for the reasons detailed in Plaintiff and the ACLU's Opposition and Motion to Quash, JetBlue's motion should be denied, and the motion to quash should be granted.

Dated: August 18, 2008

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**PROOF OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **Reply in Support of Motion to Quash Subpoena Served Upon the ACLU, along with the Supplemental Declaration of Aden Fine in Support of Motion to Partially Quash Subpoena Served Upon the ACLU** was served via the electronic case filing system on August 18, 2008 on the following:

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